IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 1532 OF 2006.

IN

SUIT NO. 637 OF 1974

The Board of Trustees of the Port of Bombay ...Plaintiff

V/s.

Ismaibhai F.Potia & Ors. ...Defendants.

Mr.U.J.Makhija i/b.Mulla & Mulla & C.B.C. for the plaintiff.
Mr.Y.H.Muchhala, Sr.Advocate a/w. Ms.Heena Advani & Mr.Farooq A.Chowdhary i/b.Sagheer A. Khan for defendant nos. 1A, 1B and 1D to 1H.

CORAM : S.J. VAZIFDAR J.

DATE : 30TH JULY, 2007.

P.C. :-

1. I would normally hesitate to set aside an ex-parte decree passed in a suit filed in the year 1974. In this matter, however, I intend doing so as a refusal to set aside the ex-parte decree would lead to grave injustice to the defendants.

2. The suit is for a decree for possession of a plot of land and for arrears of compensation and the

payments of several taxes. The plaintiffs have also prayed for further compensation until possession is delivered to them.

3. The defendant filed a written statement and has been prosecuting the suit diligently. The case of the defendants is that they had permitted one M/s. National Forest and General Mills Co.Pvt.Ltd., to occupy the premises with the knowledge and consent of the plaintiffs. I do not intend dealing with the merits of the case least it prejudice the parties at the trial. Suffice is to state that it is not possible to brush aside the defences without a trial.

4. Defendant no. 1 expired on 4th April, 1981. His heirs were brought on record. This Notice of Motion has been taken out by the heirs of defendant no.1 except defendant no. 1 (c). Mr.Muchhala, learned Senior Counsel appearing on behalf of the applicant/defendant states that defendant no. 1(c) has expired. Defendant no. 1(c) and defendant no.3 and 4 were attending to the matter.

5. The defendants had appointed M/s.Ardeshir, Hormusji, Dinshaw & Co. as their advocates and

Solicitors in 1974 itself. On 28th March, 1987 the defendants infact, submitted to a decree on admission as regards possession in view of their admission that they were not in possession and had infact permitted the said M/s. National Forest and General Mills Pvt. Ltd. to occupy the premises.

6. Unfortunately, thereafter a series of unfortunate incidents occurred which resulted in the concerned defendants not having remain present when the ex-parte decree was passed. For instance, on 4th April, 1981 defendant no.1 expired. On 30th September, 1990 defendant no.4 expired. On 24th September, 1992 defendant no.3 expired. On 5th May, 2002 defendant no. 1(c) expired.

7. The unfortunate events continued. When the decree on admission for possession was passed one A.Modi, a parties of the defendants Solicitors firm was attending to the matter. He expired soon thereafter.

8. The sole surviving partner of the Solicitor firm was quite aged and was keeping indifferent health as a result whereof he was not attending the office regularly. The said Mr.A.Modi also expired in September, 2005.

9. I see no reason to disbelieve the defendants when they state that they made enquiries with their Solicitors throughout and were informed that the matter was pending. In the aforesaid circumstances, the defendants were kept in the dark and were unaware of the developments in the matter. It is, in these circumstances, that they were unaware that on 21st November, 2003 a preliminary decree which is now sought to be set aside was passed. The defendants came to know about the said decree only on 10th October, 2006 on receiving a letter from the plaintiffs advocate. Thereupon the defendant immediately went to their Solicitors. They learnt that the Solicitors firm had ceased to exists after the expiry of sole partner in September, 2005.

10. In these circumstances, the defendants can hardly being penalised by facing an ex-parte decree in a matter which otherwise certainly requires to be tried. It is also pertinent to note that the plaintiffs had also been granted indulgence by this Court when they remained absent as recorded by the previous orders in the matter.

11. In the circumstances, the Notice of Motion is made absolute in terms of prayers (a) and (b).

,